Public Prosecutor v Subir Gole

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–49–03 OF 2014
ZAWAWI SALLEH, VARGHESE GEORGE AND PRASAD ABRAHAM JJCA
21 JANUARY 2015

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appeal by prosecution — Accused person charged for offence of murder — Trial judge reduced charge of murder under s 302 of the Penal Code to culpable homicide not amounting to murder under s 304(b) — Accused person sentenced to ten years imprisonment — Defence of cumulative provocation — Whether probable — Whether there was a series of provocation which had accumulated and amounted to grave and sudden provocation — Whether trial judge correct in reducing charge

The respondent, a Nepalese, was charged with the murder of one Tan Ai Ping. At the conclusion of the trial, the trial judge reduced the charge of murder under s 302 of the Penal Code ('the Code') to one of culpable homicide not amounting to murder under s 304(b) of the same Code and sentenced him to ten years of imprisonment. The prosecution ('the appellant') appealed against the decision. The prosecution's case was based on the testimony of an eyewitness, SP2 who worked as a cashier at the Ming Ang Bakery House Sdn Bhd, the locus in quo. SP2 heard verbal quarrel and altercation between the deceased and the respondent and rushed to the store after hearing the shouts and saw the respondent stabbing the deceased three times at the abdomen. After that, the respondent slit his own wrist and cut his neck. The deceased bled profusely and died. According to the defence, the deceased had verbally abused the respondent for over a significant period of time. According to the respondent, his passport was at all times kept by the deceased, his employer. Even though the respondent had several times requested his passport to be given back to him in order for him to return to Nepal but this was refused. Instead, he was scolded by the deceased. The respondent's defence was that he stabbed the deceased when he lost control of himself as result of cumulative provocation and that the deceased's death was not a deliberate and premeditated murder. The appellant argued that the trial judge was in error when in failing to appreciate the evidence in its true and proper prospective, in particular, the evidence of SP3 and SP7 together with other circumstantial evidence which was sufficient to bring home the charge of murder against the respondent; and the trial judge ought to have considered the prosecution's case as a whole and not in isolation. The critical issue to be determined in this instant appeal was whether there was a series of provocation which had

A accumulated and amounted to grave and sudden provocation.

Held, dismissing the appeal; affirming the conviction and sentence:

(1) The respondent had succeeded to establish on balance of probabilities that he had been deprived of self-control due to cumulative provocation at the time of the commission of the offence. All the circumstances, including the respondent's characteristics such as age, ethnic, manners, way of life, traditional values or cultural background are relevant in assessing whether the test of a 'reasonable man' would have been proved (see paras 40–41).

(2) The respondent stabbed the deceased in the heat of passion unpremeditated and in a temporary loss of self-control caused by the provocation. Prior to the occurrence, the respondent was not armed with any weapon. The brief interval in which the respondent went looking for a weapon was not significant. At the time of occurrence, the respondent remained deprived of self-control and stabbed the deceased while so deprived. Further, there was no independent requirement in law that there be no cooling-off period. The existence opportunity to cool-off between the provocative conduct and the respondent's response did not mean that the defence would fail (see para 44).

(3) The reaction of the respondent was proportionate with the provocation. The fact that there were 43 injuries found on the deceased did not affect the matter adversely to the respondent because a reaction to provocation necessary involves lack of ability to exercise restraint or to judge a situation with insight and balance. The fact that the respondent had injured himself after the attack revealed that the respondent was deprived the power of self-control. Any reasonable man placed in the situation and circumstances the respondent was placed would have acted as the respondent did (see para 45).

(4) The trial judge had not erred in fact or in law when His Lordship reduced the charge of murder under s 302 of the Code to one culpable homicide not amounting to murder punishable under s 304(b) of the Code. His Lordship had evaluated the evidence properly and made findings based on fact placed before him (see para 48).

(5) Provocative conduct, when it is sufficiently serious, is capable of inflaming anger to such degree as to be likely to lead the provoked person to lose his self-control and retaliate in violence. When the provoked person loses self-control, he is unable to weigh up the consequences for his action according to reason (see para 28).

[Bahasa Malaysia summary

Responden, warganegara Nepal, didakwa membunuh seorang Tan Ai Ping. Pada akhir perbicaraan, hakim perbicaraan mengurangkan dakwaan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') kepada satu mematikan orang dengan salah yang tidak terjumlah kepada pembunuhan di bawah s 304(b) Kanun yang sama dan menghukumnya kepada sepuluh tahun penjara. Pendakwaan ('perayu') merayu terhadap keputusan. Kes pendakwaan adalah berdasarkan testimoni seorang saksi, SP2 yang berkerja sebagai juruwang di Ming Ang Bakery House Sdn Bhd, locus in quo. SP2 mendengar pertengkaran mulut dan perbalahan antara si mati dan responden dan bergegas ke stor selepas mendengar jeritan dan melihat responden menikam si mati tiga kali di abdomen. Selepas itu, responden mengelar pergelangan tangannya sendiri dan melukakan lehernya. Si mati mengalami pendarahan teruk dan mati. Menurut pembelaan, si mati telah secara lisan mencaci responden untuk tempoh yang agak lama. Menurut responden, pasportnya pada setiap masa disimpan oleh si mati, majikannya. Walaupun responden telah beberapa kali meminta pasportnya agar dikembalikan semula kepadanya agar dia boleh pulang ke Nepal tetapi ini ditolak. Sebaliknya dia telah dimarahi oleh si mati. Pembelaan responden adalah bahawa dia telah menikam si mati apabila dia hilang kawalan dirinya akibat daripada provokasi kumulatif dan bahawa kematian si mati bukanlah disengajakan dan pembunuhan yang sudah dirancang. Perayu berhujah bahawa hakim perbicaraan terkhilaf apabila gagal menilai keterangan dalam prospektif yang betul dan wajar, khususnya, keterangan SP3 dan SP7 bersama-sama dengan keterangan mengikut keadaan yang lain yang mana mencukupi untuk mengenakan dakwaan membunuh terhadap responden; dan hakim perbicaraan sepatutnya mempertimbangkan kes pendakwaan secara keseluruhan dan bukan berasingan. Isu kritikan untuk dintentukan dalam rayuan ini adalah sama ada terdapat provokasi berturut-turut yang berkumpul dan terjumlah kepada bangkitan marah besar dan mengejut.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

(1) Responden telah berjaya untuk membuktikan pada imbangan kebarangkalian bahawa dia telah hilang kawalan diri akibat provokasi terkumpul pada masa pelakuan kesalahan itu. Semua keadaan, termasuk ciri-ciri responden seperti umur, etnik, adab, cara hidup, nilai-nilai tradisional atau latar belakang budaya yang relevan dalam menilai sama ada ujian yang 'reasonable man' akan berjaya dibuktikan (lihat perenggan 40–41).

(2) Responden menikam si mati dalam keadaan emosi yang tidak stabil yang tidak dirancang dan kehilangan kawalan diri sementara disebabkan oleh provokasi. Sebelum kejadian, responden tidak dilengkapi dengan apa-apa senjata. Jarak waktu yang singkat di mana responden pergi

A mencari senjata adalah tidak penting. Pada waktu kejadian, responden kekal dalam keadaan kehilangan kawalan diri dan menikam si mati dalam keadaan tersebut. Seterusnya, tiada keperluan bebas di dalam undang-undang bahawa tiada tempoh bertenang. Kewujudan tempoh bertenang di antara kelakuan provokatif dan tindak balas responden
B tidak bererti pembelaan akan gagal (lihat perenggan 44).

(3) Reaksi responden adalah berpatutan dengan provokasi. Fakta bahawa terdapat 43 kecederaan didapati atas si mati tidak menjejaskan perkara tersebut secara negatif terhadap responden kerana suatu reaksi terhadap
C provokasi perlu melibatkan kekurangan keupayaan untuk mengawal diri atau untuk menghakimi suatu situasi dengan pemahaman dan keseimbangan. Fakta bahawa responden telah mencederakan dirinya sendiri selepas serangan menunjukkan bahawa responden kehilangan kuasa untuk mengawal diri. Mana-mana orang munasabah diletakkan
D dalam situasi dan keadaan reeponden akan bertindak sama seperti responden (lihat perenggan 45).

(4) Hakim perbicaraan tidak terkhilaf dalam fakta atau undang-undang apabila Yang Arif mengurangkan dakwaan membunuh di bawah s 302 Kanun kepada satu mematikan orang dengan salah yang tidak terjumlah
E kepada pembunuhan yang boleh dihukum di bawah s 304(b) Kanun. Yang Arif telah menilai keterangan dengan sewajarnya dan membuat dapatan berdasarkan fakta yang dikemukakan di hadapannya (lihat perenggan 48).

F (5) Kelakuan provokatif, apabila cukup serius, boleh menyebabkan kemarahan sehingga ke tahap sebegitu sehingga mungkin untuk mengakibatkan orang yang diprovokasi kehilangan kawalan diri dan bertindak balas dengan keganasan. Apabila orang yang diprovokasi kehilangan kawalan diri, dia tidak dapat menilai akibat tindakannya
G mengikut akal (lihat perenggan 28).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

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Cases referred to

Amarjit Singh Sohan Singh v The State AIR 1970 P H 279, HC (refd)
Bala Anak Matik v PP [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309 ; [2007] 3 CLJ 281, FC
I (consd)
Ikau anak Mail v PP [1973] 2 MLJ 153, FC (refd)
KM Nanavati v State of Maharashtra 1962 SCR Supl (1) 567, SC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] CLJ (Rep) 162, SC (refd)
Mangesh v State of Maharashtra AIR 2001 SC 637, SC (refd)

Mat Sawi bin Bahodin v PP [1958] 1 MLJ 189, CA (refd)
Moffa v R (1977) 138 CLR 601, HC (refd)
Pollock v R (2010) 242 CLR 233, HC (refd)
Poovammal v State represented by Inspector of Police, VK Puram Police Station, Tirunelveli District 2012 (2) MLJ (Crl) 482, HC (folld)
PP v Kwan Cin Cheng [1998] 2 SLR 345, CA (refd)
PP v Lasakke [1964] 1 MLJ 56 (refd)
PP v Samer Klom Klom [1996] 2 CLJ 359, HC (folld)
R v Camplin [1978] AC 705, HL (refd)
R v Dutton (1979) 21 SASR 356 (refd)
R v Kumar (2002) 5 VR 193, HC (refd)
Rikky Purba v PP [2014] 4 MLJ 569; [2014] 3 CLJ 607, CA (folld)
Tan Buck Tee v PP [1961] 1 MLJ 176, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Vashram Narshibhai Rajpara v State of Gujarat (2002) 9 SCC 168, SC (folld)

Legislation referred to

Penal Code ss 300, Exception 1, 302, 304(b)

Appeal from: High Court No 45B-23 of 2012 (High Court, Johor Bahru)

Aslinda Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Salim Bashir (Salim Bashir Ruswiza & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The respondent, Mr Subir Gole, a citizen of Nepal, was charged with the murder of one Tan Ai Ping, on 6 September 2012, at Kedai No 12, Ming Ang Bakery House Sdn Bhd, Jalan Sutera 3, Taman Sentosa, Johor Bharu in contravention of s 302 of the Penal Code ('the PC'). At the conclusion of the trial, the learned trial judge reduced the charge of murder under s 302 of the PC to one of culpable homicide not amounting to murder under s 304(b) of the PC and sentenced him to ten years of imprisonment with effect from the date of arrest (6 September 2012).

[2] Being aggrieved by the aforesaid decision, the public prosecutor ('the appellant'), has appealed to this court. At the hearing of the appeal, the learned deputy public prosecutor ('the DPP') confined her argument to the main ground of appeal which was as follows:

> The learned trial Judge had erred in law and fact in holding that the respondent had proven the defence of grave and sudden provocation.

[3] Before considering the sole ground of appeal, we propose to briefly encapsulate the prosecution's case and that of the defence.

THE PROSECUTION'S CASE

[4] The facts, shortly stated, are these. On the fateful day, 6 September 2012, 'SP2' (Er Siew Lee), the eyewitness, who worked as a cashier at the Ming Ang Bakery House Sdn Bhd, the locus in quo, heard verbal quarrel and altercation (*pertengkaran mulut*) between the deceased and the respondent. She rushed to the store after hearing the shouts and saw the respondent stab the deceased three time at the abdomen. After that, the respondent slit his own wrist and cut his neck.

[5] The deceased ran towards the front of the bakery shop after the attack. She was bleeding profusely. She then became unconscious and was taken to Johor Specialist Hospital, Johor Bharu but succumbed to the injuries on 7 September 2012. Her dead body was brought to Hospital Sultanah Aminah, Johor Bharu by the police.

[6] A post-mortem examination on the deceased was conducted by Dr Khairul Anuar bin Zainun ('SP3'). SP3 opined the cause of death as 'stab wound to the chest'.

[7] The chemist, Puan Aedrianee Reeza Alwi ('SP1'), confirmed the presence of the respondent's DNA profiles on the knife used to stab the deceased. The same knife was also used by the respondent to injure himself.

THE DEFENCE'S CASE

[8] The thrust of the defence's case was that the deceased had verbally abused the respondent for over a significant period of time. He was repeatedly called as 'mad, crazy, stupid, cow and bastard'.

[9] On the fateful day, there was indeed some commotion (*pertengkaran*) between the deceased and the respondent. The deceased had repeatedly uttered the above words and insulted the respondent's mother with the demeaning and derogatory words: 'ibu yang mana satukah melahirkan anak seperti kamu?'. The respondent felt hurt as at that particular time he wanted to go back to Nepal to visit his mother but his request was rejected by the deceased. According to the respondent, the verbal provocation on that day by the deceased had really enraged him. The respondent had finally snapped and lost his self-control.

[10] The respondent deposed that he came from a staunch and conservative Hindu family consisting of his 50 years old mother, his wife and a three years old son. His father passed away when he was a child. His education was up to year ten.

[11] The respondent came to Malaysia to look for a job in September 2011. Prior to this, he was a construction worker for four to five years in Qatar. He started to work in a restaurant in Yong Peng in Johor. He paid RM3,000 as agency fees to come to Malaysia. His employer was also the owner of Ming Ang Bakery in Taman Sentosa, Johor Bahru.

[12] According to the respondent, his passport was at all time kept by the employer. The respondent had several times requested his passport to be given back to him in order for him to return to Nepal but this was refused. Instead, he was scolded by the deceased.

[13] The respondent further deposed that he was subjected to ill treatment and mental torture by the employer ('the deceased'). He was denied leave and had to work from 7am–9pm daily.

[14] As for the event on 6 September 2012, the respondent claimed that he did not remember what had happened. He has no recollection of stabbing the deceased. He could not explain how blood stains of the deceased was found on the knife and at the scene of the incident. He also could not explain how blood stains were found on his hand and neck.

[15] In a nutshell, the respondent's defence was that he stabbed the deceased when he lost control of himself as result of cumulative provocation. The deceased's death was not a deliberate and premeditated murder.

[16] We now propose to address the appellant's ground of appeal.

THE APPEAL

[17] The gravamen of the learned DPP was in relation to the trial judge's decision to amend the charge from s 302 of the PC to one under s 304(b) of the PC when there was sufficient evidence to convict the respondent on the original charge of murder.

[18] The learned DPP submitted that the learned trial judge was in error when he failed to appreciate the evidence in its true and proper prospective, in particular, the evidence of SP3 and SP7 together with other circumstantial

A evidence which was sufficient to bring home the charge of murder against the respondent. The learned trial judge ought to have considered the prosecution's case as a whole and not in isolation.

B **[19]** The learned DPP asserted that there was an eyewitness, SP2, who saw the respondent stab the deceased. SP2 was working as a cashier and when she rushed to the store after hearing the shouts, she saw the respondent already stabbing the deceased. The learned DPP posited that the evidence of SP2 was supported by CCTV evidence.

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[20] Further, there was the evidence of Dr Khairul Anuar bin Zainun (SP3) who testified that the injuries inflicted by the respondent on the deceased were fatal and had caused the death of the deceased. The fact that the respondent was armed with a deadly weapon when attacking the deceased led to the irresistible
D inference that there was intention on the part of the respondent to cause serious bodily harm or death to the deceased (see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC); *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176 (CA)).

E GRAVE AND SUDDEN PROVOCATION

[21] The learned DPP submitted that the defence of grave and sudden provocation did not apply to the respondent based on the following reasons:

F (a) the abusive words uttered by the deceased almost daily ('crazy, lazy, cow, stupid and bastard') were not sufficient to constitute a defence of grave and sudden provocation under Exception 1 to s 300 of the PC. The fact that the respondent remained silent despite the deceased having uttered the abusive words almost daily showed that these words had not caused
G him to lose his self-control. If these words had affected him, he would have surely done something and not just remain silent;

(b) there appears to be a 'cooling-off period' between the time when the deceased uttered the alleged abusive words and the act of the respondent
H stabbing the deceased. This was supported by the fact that the respondent went looking for a weapon and when he found it, he started to stab the deceased;

(c) the respondent's reaction to the alleged abusive words by the deceased
I was not proportionate in that he had acted in a brutal fashion where there were 43 injuries sustained by the deceased; and

(d) the nature and number of injuries sustained by the deceased depicted that there was a clear intention on the part of the respondent to murder the deceased.

[22] In support of her submission, the learned DPP relied on the following cases: A

(a) *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] CLJ (Rep) 162 (SC);

(b) *Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229; B

(c) *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 ; [2007] 3 CLJ 281; and

(d) *Ikau anak Mail v Public Prosecutor* [1973] 2 MLJ 153 (FC). C

OUR ANALYSIS AND DECISION

[23] Firstly, we will examine the relevant parts of the trial judge's grounds of judgment in order to determine whether or not His Lordship was correct in making the decision as he did. D

[24] The learned trial judge in a lengthy judgment had accepted the defence's plea of grave and sudden provocation. At pp 28–29, of the appeal records, the learned trial judge said: E

> Meneliti kepada keterangan oleh OKT, adalah jelas akan wujudnya tekanan yang terpaksa dilalui olehnya sewaktu bekerja di kedai bakery tersebut. Seperti apa yang dinyatakannya, apa sahaja yang dibuatnya, supervisornya (simati) tidak bersetuju. Ini menjadikannya sentiasa bingung dan serba salah. Di sepanjang 4 bulan bekerja di situ, dia cuma diberikan cuti 1 hari sahaja, walaupun pada awalnya dijanjikan 4 hari sebulan. Semua kerja di kedai bakery itu, terpaksa dilakukan olehnya sendirian setelah seorang lagi pekerja berhenti. Biskut yang rosak atau tidak laku, dia dipaksa makan atau dipaksanya beli dengan cara dipotong gajinya. Dengan gaji yang tidak seberapa cuma RM700.00 sebulan, dengan layanan yang buruk diterima dari supervisornya, dengan bebanan kerja yang terpaksa ditanggungnya, beliau masih boleh bersabar demi mencari nafkah di tempat orang. Belanja makan RM5 sehari seperti yang dijanjikan tetapi tidak tetap diberikan kepadanya disertakan dengan kata nista serta penghinaan yang diterimanya membuat beliau hampir berputus asa dan memohon untuk dihantar pulang. Akan tetapi ini tidak dilayan. Sikap simati itu adalah memperlihatkan sikap seorang yang tidak berpelajaran dan sombong serta tidak munasabah oleh seorang 'supervisor' terhadap seseorang 'subordinate'. Ini lebih ketara bilamana selain dari tekanan demi tekanan diberikan kepada OKT, kata-kata penghinaan seperti gila, malas, 'cow', 'stupid', dan 'bastard' adalah kata-kata harian yang sentiasa dihamburkan oleh simati kepada OKT. Walaupun OKT orang asing, dia tetap seorang insan yang mempunyai perasaan dan harga diri. F G H
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> Dia tidak ingin datang di Negara ini jika dia tahu dia akan diperlakukan sedemikian. Siapakah yang sanggup bertahan seandainya bekerja di bawah seliaan seorang supervisor yang bersikap keji seperti simati. Supervisor itu dikatakan mempunyai suara yang lantang bila bercakap. Di hari kejadian, SP2 mengesahkan terdapat pertengkaran mulut di antara simati dengan OKT. SP2 menyatakan yang I

simati ada menggunakan suara lantang sebelum menjerit kepada OKT. Menurut OKT pula, beberapa hari sebelum kejadian, simati semakin menjadi-jadi marahnya terhadap OKT. Apa sahaja yang dilakukan oleh OKT, semua tidak kena. Pelbagai tekanan diberi, bermacam kerja diarahkan sehingga OKT menjadi keliru dan hilang kawalan serta pertimbangan diri. Apabila disoal oleh Mahkamah akan apakah klimaknya yang membuatkan dia hilang kawalan dan langsung menikam mangsa, dia menyatakan:

> Saya bertindak menikam simati pada hari itu sebab walaupun perkataan penghinaan dia gunakan terhadap saya, tetapi perbuatan dari simati yang berkata 'Ibu manakah yang telah melahirkan anak seperti kamu', ini yang membuatkan saya tidak dapat terima. Simati keluarkan perkataan ini pada hari-hari lain, tapi hari itu dia gunakan, saya rasa sedih sebab di ketika itu ibu saya sedang sakit di Nepal.

[25] His Lordship then continued at pp 30–31 as follows:

> Secara rasionalnya, tanpa mengira adat, agama atau kepercayaan, sesiapa sahaja yang berada di dalam kedudukan OKT, seandainya diungkit dan dipersendakan akan asal usul dan ibu bapanya serta keturunannya, itu dianggap sudah melampaui batas dan melebihi had kesabaran. Apakah hak dan siapakah dia simati, untuk mempersoalkan perkara tersebut dengan mempersendakan keturunan orang lain.

[26] His Lordship concluded at p 32:

> Apatah lagi untuk mempersendakan dengan perkara sensitif seperti itu. Walaupun dari segi norma kehidupan tindakan OKT menikam mangsa itu adalah sesuatu yang keterlaluan dan salah dari segi Undang-undang, kita dapat merasakan akan tekanan jiwa dan perasaan yang terpaksa dilalui dan dihadapi oleh OKT pada setiap hari datang bekerja dan terpaksa berhadapan dengan simati. Hujah peguambela yang menyatakan bahawa fakta dan keadaan sekitaran tidak memperlihatkan yang OKT mempunyai 'mens rea' yang spesifik semasa melakukan, jelas bermerit. Tindakan dan perbuatan OKT itu tidak menampakkan akan niatnya untuk membunuh seperti yang boleh ditakrifkan di bawah seksyen 300 Kanun Keseksaan. Dari rentetan peristiwa yang dinyatakan itu, jelas kelihatan wujudnya 'grave and sudden provocation' yang datangnya dari simati sendiri. Perbuatan OKT itu terjatuh di bawah Pengecualian 1, seksyen 300 Kanun Keseksaan. Lantas suatu kesalahan di bawah seksyen 304(b) telah dibuktikan.

[27] We have gone through the impugned judgment and the entire material on the record to reassess the reasoning given by the learned trial judge in reducing the charge of murder under s 302 of the PC to one under s 304(b) of the PC. On an evaluations of the same, we do not find His Lordship's finding as to be perverse warranting our intervention.

[28] In order to appreciate the contention of the learned DPP, it would be useful to have a look at the law relating to provocation. Exception 1 to s 300 of the PC operates as a mitigatory or partial defence to murder aimed at the

reduction of that offence to simple culpable homicide not amounting to murder. The doctrine of provocation is a concession to human frailty or infirmity, a recognition that a lower standard of criminal responbility should apply to one who kills when he is 'for the moment not master of his mind'. This approach to defence hinges on the notion of loss of self-control. Its rationale is that provocative conduct, when it is sufficiently serious, is capable of inflaming anger to such degree as to be likely to lead the provoked person to lose his self-control and retaliate in violence. When the provoked person loses self-control, he is unable to weigh up the consequences for his action according to reason (see Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992)).

[29] 'Provocation' has not been defined in the PC. Generally speaking, there are three main types of provocations, namely:

(a) ordinary provocation (reasonable);

(b) cumulative provocation; and

(c) self-induced provocation.

[30] Ordinary provocation refers to that provocation which causes a man to lose his self-control; and although a reasonable man who has lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable. This form of provocation is based on the standard of the reasonable or ordinary man.

[31] Cumulative provocation is a series of acts or words over a period of time which culminates in the sudden and temporary loss of self-control. This provocation is not confined to the last acts before killing the accused; there may have been previous acts or words which when added, caused the accused to lose his self-control although the last act may not be sufficient to cause provocation.

[32] Self-induced provocation is a form of provocation in which the accused himself started the trouble. This type of provocation is rarely successful as a defence owing to the fact that the accused actually 'provoked' himself and may be rendered responsible for his own anger because he started the trouble himself.

[33] What would amount to 'grave and sudden provocation' will depend on the facts of each case. Thus, no straitjacket formula that can be evolved to categories what acts may amount to provocation much less grave and sudden provocation. In the case of *Che Omar bin Mohd Akhir v Public Prosecutor*, Nik Hashim FCJ said:

A [14] The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s 300 of the PC; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC). Each case is to be considered according to its own facts. The court must decide on the particular
B circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused, (see *Ratanlal & Dhirajlal, The Indian Penal Code*, (29th Ed), 2002 p 1194).

[15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ
C 143; [1988] 1 CLJ (Rep) 162. Seah SCJ in delivering the judgment of the court said:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see
D *Nanavati v State of Maharashtra* AIR 1962 SC 605, 530).
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> In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncrasies of the accused: *Madhavan v State of Kerala* AIR 1966 Ker 258 (260).

E [16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as (i) actually causes in the accused, and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.

F [17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that
G question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.

(See *Ratanlal & Dhirajlal*, p 1192; *Vijayan v Public Prosecutor* [1975] 2 MLJ 8; [1975] 1 LNS 189).

H **[34]** The critical issue to be determined in this instant appeal is whether there was a series of provocation which had accumulated and amounted to grave and sudden provocation. The learned DPP forcefully argued that there was no such thing as cumulative provocation. She referred us to a passage in the case *Che Omar* which reads as follows:

I [22] In the present case, the only provocation was a suspicion in the mind of the appellant that the deceased was unfaithful to him when she referred to PW7 as 'He is my man'. What was found by the learned trial judge was that the provocation was gradual. He was right. To our minds, there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of

its gravity and suddenness (as in the case here) a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC.

[35] With respect, we disagree with that contention. The statement in the case of *Che Omar* should be looked in the context of the factual matrix of that case. It will be seen that the basic premise in the above sentence is 'In the present case, the only provocation was a suspicion in the mind of the appellant ...'. In our view, verbal provocation (as in the instant appeal) may operate where there is cumulative provocation and the immediate provocation represents the straw that breaks the camel's back. This involves a situation where there is a series of provocation where the last insult may appear trivial when viewed in isolation and on its own, but the last insult which when viewed against the cumulative provocation bring events to a boiling point (see *Mat Sawi bin Bahodin v Public Prosecutor* [1958] 1 MLJ 189; *Public Prosecutor v Lasakke* [1964] 1 MLJ 56).

[36] In *Rikky Purba v Public Prosecutor* [2014] 4 MLJ 569; [2014] 3 CLJ 607, this court had laid down the principle of cumulative provocation. The court had this to say at pp 585–596 (MLJ); pp 623–634 (CLJ):

> [36] Now, the concept of cumulative provocation has been recognised by Indian and Malaysian courts. The learned authors of *Criminal Law in Malaysia and Singapore*, (2nd Ed), LexisNexis, 2012, had this to say (at pp 805–806):
>
> The Indian courts have recognised this concept of cumulative provocation ever since the inception of the Code. The early recognition of cumulative provocation is remarkable given that the English law at the time of the Code's promulgation restricted the provocative conduct to that which occurred immediately prior to the killing. The following third proposition of the Indian Supreme Court in *Nanavati* merely reaffirmed this longstanding position:
>
> > The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.
>
> This proposition has also been applied locally, with cases of domestic killings involving a long history of physical, emotional and mental abuse comprising a common instance. For example, in the Singapore High Court case of *Public Prosecutor v Sundarti Supriyanto*, the deceased had physically and emotionally abused her domestic maid for an extended period of time. The court held that this history of abuse comprised the 'mental background' of the accused which was relevant to the determination of grave provocation. Generally speaking, the judicial recognition of cumulative provocation does not replace the need for the provocative conduct to have been grave and sudden. As the Malaysian Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* put it 'Devoid of its gravity and suddenness ... a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the [Penal Code].

A [37] In the case of *R v Ahluwalia* [1992] 4 All ER 889, Lord Taylor said:

> We accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a sudden and temporary loss of self-control caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation.

B

[38] We agree with the proposition of law above. In our considered opinion, the law had set no limit on the duration of a man's passion. This would vary from one individual to another, and would depend on the circumstances in which the killing took place. The background circumstances, such as earlier provocations, 'could be taken into account in determining whether a subsequent comparatively trivial act of provocation ... could cause slumbering fire of passion to burst into flame' (see *McGregor* [1962] NZLR 1069 at p 1080).

C

[39] Thus, in considering the question whether the appellant was actually provoked to lose his self-control, the court is entitled to consider the immediate act that caused death as well as all relevant circumstances preceding or surrounding that act. The nature of the alleged provocation, the manner in which the appellant reacted, the time which eloped between the provocation and the appellant's response, previous relations between parties, the sensitivity or otherwise of the appellant are relevant considerations to answering the subjective question on provocation.

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E

[40] Another important fact to be noted is that in endeavouring to determine whether there has been 'time for his passion to cool off', a court is not required to resort to any mathematical formula or to arrive at any computation of time expressed in minutes or hour. The court must, however, conduct a careful circumstances of the case before it. In doing so, the court must seek to establish whether at the time of doing the act which caused death the passion of the accused had cooled off.

F

[37] The decision in *KM Nanavati v State of Maharashtra* 1962 SCR Supl (1) 567 subsequently has been applied, approved and followed by a number of cases. In *Poovammal v State represented by Inspector of Police, VK Puram Police Station, Tirunelveli District* 2012 (2) MLJ (Crl) 482, the Indian court referred to the offence of manslaughter in English law, an offence committed during provocation and observed as follows:

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> 30. Under the English Criminal Law, the provocation must be grave and also sudden. But, by way of judicial thinking, the Indian Criminal Law has gone ahead (*KM Nanavathi v State of Maharastra*). In our system, there is the concept of sustained provocation. It is concerned with the duration of the provocation. There may be incidents/occurrences, which are such that they may not make the offender suddenly to make his outburst by his over tact. However, it may be lingering in his mind for quite some time, torment continuously and at one point of time erupt, make him to lose his self control, make his mind to go astray, the mind may not be under his control/command and results in the offender committing the offence. The sustained provocation/frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.

I

[38] In *Vashram Narshibhai Rajpara v State of Gujarat* (2002) 9 SCC 168, the brief facts of the case are that the house purchased by the accused was not to the liking of his wife and daughter and they continuously rebuked him, unable to bear this at one point of time he killed them. The Supreme Court of India held that though they were all living together, the continuous harassment and constant nagging could have very well affected his mental balance and as such sustained provocation could have reached a boiling point resulting in the dastardly act and ultimately set aside the death sentence and awarded him life sentence.

[39] The doctrine of cumulative provocation is also recognised by other Commonwealth jurisdiction. In *Public Prosecutor v Samer Klom Klom* [1996] 2 CLJ 359; the High Court of Brunei had this to say:

> The mental background created by the previous conduct or words of the victim may also be taken into account in ascertaining whether a subsequent act could be said to have caused grave and sudden provocation.
>
> This means that provocation can be cumulative (see *Public Prosecutor v Lasakke* [1964] 1 MLJ 56; [1963] 1 LNS 95) in the sense that previous acts may bring a defendant to a point at which he loses control because the last act, though insufficient in itself, is the final straw which breaks the back of a camel which is already carrying a heavy load from previous provocations, though the final act of provocation must be of a nature which can reasonably be said to revive the earlier ones — eg a later reference to debt might revive earlier references to money, but it would not revive an earlier accusation of sexual inadequacy.

[40] Applying the above principles on the law of provocation to the factual matrix of this instant appeal, we agree with the learned trial judge that the respondent had succeeded to establish on balance of probabilities that he had been deprived of self-control due to cumulative provocation at the time of the commission of the offence. We say so based on the following uncontroverted evidence:

(a) the respondent was subjected to ill treatment and mental torture by the deceased over a significant period of time when he was working at Ming Ang Bakery House. He was denied leave and had to work from 7am–9pm. In addition, he also had his pay cut for biscuits cooked by him which were spoiled;

(b) the respondent's relationship with the deceased was punctuated by almost daily verbal abuses and mental tortures. The deceased constantly uttered the words: 'mad, crazy, stupid, cow and bastards'. In our opinion, the respondent was in a 'pressure cooker environment' in which he was experiencing a range of emotions including anger, frustration and despair;

(c) the utterance of the words: 'Ibu yang manakah yang telah melahirkan anak seperti kamu' by the deceased on the fateful day should be regarded akin to the straw that broke the camel's back. It was the culmination of a lengthy period of ill treatment and mental torture with which the respondent were unable to cope and it resulted in the respondent losing self-control; and

(d) it should not be overlooked that the words: 'Ibu yang mana satukah yang telah melahirkan anak seperti kamu'; not only referred to the respondent personally but also a derogatory reference to his family's pride and honour. It would not be difficult to conclude that the respondent really felt hurt by these words because at that time his mother was sick and prior to that his request to visit his mother was rejected by the deceased. Any reasonable man in such circumstances would have been inflamed to violent passion against the deceased. In the case of *Amarjit Singh Sohan Singh v The State* AIR 1970 P H 279, the court had this to say:

> 9. The learned counsel of the State before us, argued that among villagers filthy abuses are commonly used as meaningless expletives, and therefore can never, in a case concerning them, amount to grave and sudden provocation within the said Exception. We are unable to agree with this reasoning It is a matter of common knowledge that Punjab villagers are very sensitive in such matters. A foul abuse with reference to the mother or sister, without any other motive, often provokes the villager abused to violent crime, including murder. Under the Indian Penal Code, even foul words may amount to grave and sudden provocation. The authors of the Code have observed:
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> > It is an indisputable fact, that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart.

[41] It is pertinent to note that all the circumstances, including the respondent's characteristics such as age, ethnic, manners, way of life, traditional values or cultural background are relevant in assessing whether the test of a 'reasonable man' would have been proved. As Lord Morris said in *R v Camplin* [1978] AC 705 at p 721:

> If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic origin — or to consider how such a man would have acted or reacted.

[42] In *R v Dutton* (1979) 21 SASR 356, the South Australian Full Court followed *Camplin* where Justice Cox said:

> The ordinary man against whom the actions of the accused are to be judged is one possessing all the characteristics and idiosyncrasies of the accused himself — age, sex, race, colour, physical defects and so on — that would have affected his conduct in the circumstances in which the accused found himself, with the exception of any extraordinary excitability or pugnacity that the accused happened to possess.

[43] It was in the evidence that the respondent was an odd job worker and just a simple village folk with low education from Nepal. He hailed from a staunch and conservative Hindu family. This background is important to be noted in order to put the stabbing of the deceased in it proper context and to explain why the respondent lost self-control in the face of the words uttered.

[44] Based on the facts in the evidence, we are of the opinion the respondent stabbed the deceased in the heat of passion unpremeditated and in a temporary loss of self-control caused by the provocation. Prior to the occurrence, the respondent was not armed with any weapon. The brief interval in which the respondent went looking for a weapon was not significant in the circumstances of this instant appeal. At the time of occurrence, the respondent remained deprived of self-control and stabbed the deceased whist so deprived. Further, there is no independent requirement in law that there be no 'cooling-off period'. The existence opportunity to 'cool-off' between the provocative conduct and the respondent's response does not mean that the defence will fail (see *Moffa v R* (1977) 138 CLR 601; *R v Kumar* (2002) 5 VR 193; *Pollock v R* (2010) 242 CLR 233). However, the 'cooling-off period' can be important consideration in determining whether the respondent's act was caused by the provocative conduct, rather than caused by motives of revenge or punishment. The prosecution did not adduce a shred of evidence from which we could infer that there existed a grudge, hatred or revenge on the part of the respondent.

[45] We are of the opinion that in the circumstances of this instant appeal, the reaction of the respondent was proportionate with the provocation. The fact that there were 43 injuries found on the deceased did not affect the matter adversely to the respondent because a reaction to provocation necessary involves lack of ability to exercise restraint or to judge a situation with insight and balance. The fact that the respondent had injured himself after the attack revealed that the respondent was deprived the power of self-control. Any reasonable man placed in the situation and circumstances the respondent was placed would have acted as the respondent did. In *Public Prosecutor v Kwan Cin Cheng* [1998] 2 SLR 345, the Singapore court ruled:

> In our view, a 'proportionality' criterion would be more accurately expressed in the following terms: in deciding if an accused had exercised sufficient self-control for the objective test, a relevant question may be whether the degree of loss of self-control was commensurate with the severity of the provocation. Nonetheless, it must be recognised that where the provocation defence in Exception 1 to s 300 is concerned, the accused's loss of self-control would ex hypothesi always have been of

A an extreme degree, resulting in the killing of another person. In practice, an inquiry into proportionality does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have lost his self control to this extent and reacted as the accused did.

B **[46]** As regards the intention of the respondent is concerned, in the light of the evidence as we alluded to earlier, it was clear that the incident took place in the heat of passion. The respondent was deprived of self-control and there was no premeditation or deliberation on the part of the respondent to stab at the deceased. The weapon used to stab the deceased was not carried by the C respondent but picked up from the sport. In *Mangesh v State of Maharashtra* AIR 2001 SC 637, the court had this to say:

> The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon D used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave E and sudden provocation and if so the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to F individual cases which may throw light on the question of intention.

SENTENCE

[47] The learned DPP made no submissions regarding the sentence. We, G therefore, need not consider the adequacy or otherwise the sentence imposed by the learned trial judge.

CONCLUSION

H **[48]** We find that the learned trial judge had not erred in fact or in law when His Lordship reduced the charge of murder under s 302 of the PC to one culpable homicide not amounting to murder punishable under s 304(b) of the PC. His Lordship had evaluated the evidence properly and made findings based on fact placed before him. On a totality of the evidence, we were of the I unanimous view that the evidence pointed to cumulative provocation. The learned trial judge has taken into consideration all the relevant factors, including the characteristics of the respondent in making the decision as he did. Therefore, we dismissed the appeal and affirmed the conviction and sentence passed by the learned trial judge.

Appeal dismissed; conviction and sentence affirmed.

Reported by Afiq Mohamad Noor